

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
)
Application of SBC Communications)
Inc., Southwestern Bell Telephone-)
Company, and Southwestern Bell)
Communications Services, Inc.,)
d/b/a Southwestern Bell Long Distance)
for Provision of In-Region, InterLATA)
Services in Texas)

CC Docket No. 00-4

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OFFICE OF THE SECRETARY

COMMENTS OF BLUESTAR COMMUNICATIONS, INC.

BlueStar Communications, Inc., on behalf of itself and its affiliates (collectively, "BlueStar"), submits these comments in response to the application of SBC Communications, Inc. ("SWBT") for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Texas ("Application").

I. INTRODUCTION AND SUMMARY

BlueStar, based in Nashville, Tennessee, currently provides customers with high-speed xDSL data connections and Internet access in nine states in the BellSouth region. BlueStar's affiliate is certificated to provide xDSL services in an additional 13 states, including Texas, and intends to begin offering xDSL service in those states in the next year.

BlueStar's ability to compete against SWBT in the market for xDSL services in Texas depends critically on the FCC's enforcement of requirements established to ensure nondiscriminatory access to xDSL-capable loops and related services. While SWBT has

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made progress toward meeting those requirements, the data contained in SWBT's application does not demonstrate that SWBT currently satisfies important xDSL performance requirements; nor has SWBT demonstrated that it has established a fully operational affiliate that provides retail xDSL services in parity with SWBT's competitors. Accordingly, SWBT's application is premature and should not be granted unless critical deficiencies are adequately addressed.

II. DISCUSSION

A. Implementation of Market-Opening Requirements is Critical to the Growth of Competition for xDSL Services.

The advanced services market is still in its developmental stage, as the Commission has recognized.¹ In most markets, including Texas, competition among xDSL providers has just begun to emerge. BlueStar and other competitive xDSL providers cannot enter the xDSL market without nondiscriminatory access to xDSL-capable loops and other essential facilities controlled by ILECs such as SWBT. Because SWBT competes in the market for xDSL services, SWBT has the incentive to use its control of bottleneck facilities to thwart competition. BlueStar and other competitive xDSL providers therefore depend critically on the Commission to implement requirements that will open -- and keep open -- the xDSL market. Without strict implementation and enforcement of such requirements, consumers will never realize the benefits of competitive advanced services under sections 251, 271, and 706 of the Communications Act.

¹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Third Report & Order ¶ 3, FCC 99-355, (rel. Dec. 9, 1999).

The arbitration award recently approved by the Texas Public Utility Commission (“Texas PUC”) contains measures that will help open the xDSL market to competition. The requirements adopted by the Texas PUC provide a useful model for the Commission to consider in determining the terms under which SWBT’s Application could be approved. However, for the reasons discussed below, it is not clear whether SWBT is, or will soon become, able and willing to comply with those requirements.

B. SWBT Has Not Demonstrated that It Provides xDSL Services on a Nondiscriminatory Basis.

In granting Bell Atlantic’s (“BA’s”) section 271 application, the Commission found that BA had barely met the checklist requirements with respect to xDSL-capable loops. Because BA failed to demonstrate that its actual performance in providing xDSL-capable loops was acceptable, the Commission was forced to use BA’s overall loop performance as a proxy for BA’s xDSL - capable loop performance. The FCC specifically warned future section 271 applicants of the showing that would be required:

[W]e will find it most persuasive if future applicants under section 271, unlike this applicant, make a separate and comprehensive evidentiary showing with respect to the provision of xDSL-capable loops, either through proof of a fully operational separate advanced services affiliate as described below, which may also include appropriate performance measures, or through a showing of nondiscrimination in accordance with the guidance provided herein. Given our statutory obligation to encourage deployment of advanced services and the critical importance of the provisioning of xDSL loops to the development of the advanced service marketplace, we emphasize our intention to examine this issue closely in the future.²

² *In the Matter of Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order ¶ 330 (rel. Dec. 22, 1999) (“BA Order”) (emphasis added).

Despite these clear instructions, SWBT's application fails to demonstrate that SWBT's provisioning of xDSL services satisfies the applicable requirements through actual performance data or through the establishment of a separate, fully operational affiliate.

1. **SWBT's Performance Data Does Not Provide A Reliable Basis Upon Which the Commission Could Conclude That SWBT Provides xDSL-Capable Loops In A Nondiscriminatory Manner**

In order for SWBT to satisfy the nondiscrimination requirement under section 271, it must show that it provides its competitors with access to functions in "substantially the same time and manner" as SWBT provides analogous functions to itself.³ In the context of xDSL services, such nondiscriminatory access must include the following performance criteria that are critical to competitive xDSL providers such as BlueStar:

1. Provision of loops of the same quality as that of the lines that SWBT uses for its provision of retail xDSL services, including loop conditioning at reasonable TELRIC-based rates, adherence to an established coordinated hot cut process without service disruptions, and verified compliance with the Commission's UNE remand order;
2. Provision of xDSL-capable loops in the same interval in which SWBT provides xDSL service to its own retail customers;
3. Meeting on-time the same number of installation appointments for the customers of competing carriers as SWBT meets for its own customers;

³ See BA Order ¶ 44.

4. Performance of maintenance and repair functions for competitors' xDSL loops in the same time and manner as SWBT does for its retail lines;
5. Nondiscriminatory access to fully automated OSS functions associated with the provision of xDSL loops, including access to loop qualification information and databases;
6. Adherence to firm order commitment dates and jeopardy notices that allow CLECs to monitor the status of their orders;
7. Coordination of related orders for migration from a SWBT retail line to an unbundled switch/port and loop combination; and
8. Adequate anti-backsliding requirements.

Determining whether SWBT's performance satisfies these and other critical xDSL performance criteria requires substantial data collected over a reasonable period of time. The Commission stated in the BA Order that if an applicant chooses to make its case for section 271 authority by submitting performance data, then the Commission would examine that data carefully in light of the performance standards adopted by the relevant state commission.⁴ The Commission stated a "strong preference for a record that contains data measuring a BOC's performance pursuant to state-adopted standards that were developed with input from the relevant carriers and that include clearly-defined guidelines and methodology."⁵

The xDSL performance data provided by SWBT fails to meet the Commission's standard in several respects. First, SWBT's scant data covers a period of only three months, which cannot result in reasonably reliable data. The data therefore does not paint

⁴ *Id.*, ¶ 333.

⁵ *Id.*, ¶ 334.

an accurate picture of SWBT's actual performance in provisioning xDSL loops. Second, SWBT was late in developing the data, and the accuracy of the data is largely untested. Third, SWBT's data does not even exist for many of the requirements imposed by the arbitration award approved by the Texas PUC. SWBT has objected to those requirements, delayed implementation of them, and reserved its right to appeal them. SWBT's response to the Texas PUC requirements speaks volumes about SWBT's intention to provision xDSL services on a nondiscriminatory basis. While SWBT is legally entitled to seek judicial review of those requirements, until any appeal is final the Commission will not have state-adopted standards against which to "carefully examine" SWBT's performance.⁶

In light of the above deficiencies in SWBT's data, the Commission does not have an adequate basis upon which it could reasonably conclude that SWBT provisions x-DSL services on a nondiscriminatory basis. The Commission therefore should deny SWBT's Application until such time as SWBT supplements the record with adequate evidence of its actual compliance with the Commission's nondiscrimination requirements.

2. SWBT Has Not Demonstrated That It Has Established A Fully Operational Affiliate That Provides Retail Advanced Services

BlueStar agrees with the Commission's conclusion that a BOC's provision of advanced retail services through a separate, fully operational affiliate would reduce the BOC's ability to discriminate against competing carriers with respect to xDSL services.⁷ SWBT, however, has not demonstrated that it has actually established a separate affiliate

⁶ See *id.*, ¶¶ 333, 334.

⁷ *Id.*, ¶ 331.

that is fully operational in providing retail xDSL services in Texas. SWBT describes its future plans for an affiliate to provide xDSL services in Texas,⁸ but it has yet to be seen whether those plans will become reality and whether SWBT's provision of xDSL services to its affiliate will be in parity with SWBT's competitors. SWBT's plans are clouded by SWBT's observation that "the Commission did not specify any criteria for determining whether the separate affiliate is fully operational."⁹ In light of these uncertainties, the Commission should not assume that SWBT's mere establishment of a separate subsidiary will result in a level playing field for xDSL services.¹⁰

3. The Commission Should Encourage SWBT to Implement the Texas Requirements in Other States

BlueStar believes that the requirements adopted in Texas could serve as a useful model in other states. It would make little sense to re-arbitrate these issues in every in SBC's region. BlueStar encourages the Commission in this proceeding, under the public interest standard of section 271(d)(3)(c), to take steps to assure that SBC implements these requirements throughout its region. The Commission should also require SBC to demonstrate that it is in full compliance with the SBC/Ameritech merger conditions. These steps will help assure that any authorization to permit SBC to offer long distance service in Texas will serve the public interest.

⁸ SWBT Application, Aff. of Lincoln Brown at 4.

⁹ BA Order ¶ 11.

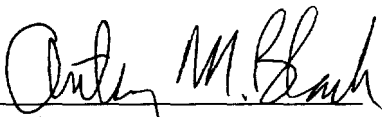
¹⁰ *See id.*, ¶ 37.

III. CONCLUSION

BlueStar urges the Commission to scrutinize SWBT's section 271 application carefully to ensure strict compliance with the checklist requirements applicable to the provision of xDSL services. The deficiencies described above, together with any deficiencies that may be identified in the comments of other parties or in BlueStar's reply comments, indicate that SWBT has not satisfied its burden to show that granting its application would be in the public interest as required under section 271.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of Comments of Blue Star Communications Regarding Southwestern Bell's Section 271 Application was served on the parties listed below via first-class mail, postage pre-paid on the 31st day of January, 2000.

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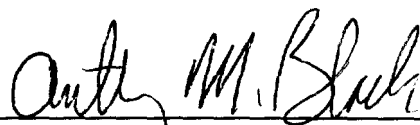
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